Supreme Court, U.S.
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No. 91-1884

In the Supreme Court of the United States

OCTOBER TERM, 1992

CESAR TANGONAN AND
ROSARIO TANGONAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was removed from the court's jurisdiction.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F1-F2) and the opinions of the district court (Pet. App. A1-A3, B1-B2, C1-C5, D1-D3, E1-E6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. The petition for a writ of certiorari was filed on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATE

1. On July 31, 1988, Elvia
ciate of a drug-trafficking
conveying to petitioners tit
located at 12388 Avenid
Bernardo, California. On A
States filed a complaint for
erty under 21 U.S.C. 881 all
purchased with the proceeds
same time, the government
property with the San Dieg
On September 27, 1988, peti
tion with Felix-Soto. Petitio
was recorded, and Felix-Sot
proceeds of the sale. Pet. A
20, 1989, petitioners substitu
dant *res*. Pet. App. C1-C5.

2. By order dated July 11,
that petitioners were not bo
The court found that the g
pendens on the property ga
notice of the pending forfeit
erty. Pet. App. D7-D12. O
court granted the governm
judgment. Pet. App. E1-E6.
ernment had met its burden
was purchased with proceed
ing. Pet. App. E4-E5. Acc
that the *res* be forfeited to th

Petitioners filed a notice
seek a stay of judgment or o
prevent execution of the cou
the United States Marshal
Department of Justice Asset
United States Treasury. Pet

IENT

Felix-Soto, an alleged asso-
rganization, signed a deed
to a residential property
Consentido, in Rancho
gust 22, 1988, the United
orfeiture against the prop-
ging that the property was
of drug trafficking. At the
filed a lis pendens on the
County Recorder's Office.
oners closed their transac-
ners' deed from Felix-Soto
received $137,000, the net
p. C2, D2-D3, E3. On June
ed $137,000 for the defen-

1990, the district court held
a fide purchasers for value.
vernment's filing of the lis
e petitioners constructive
re action against the prop-
June 5, 1991, the district
nt's motion for summary
The court held that the gov-
showing that the property
traceable to drug traffick-
rdingly, the court ordered
United States. *Id.* at E5.
appeal, but they failed to
tain a supersedeas bond to
's order. On June 24, 1991,
ransferred the *res* to the
Forfeiture Account of the
7.

3. The government moved to dismiss the appeal on the ground that the departure of the *res* deprived the court of jurisdiction. On March 13, 1992, petitioners filed a motion in the court of appeals seeking a stay of execution. On March 17, the court of appeals granted the government's motion to dismiss. Pet. App. F1-F2. The court of appeals held that petitioners "have failed to demonstrate that any errors in the transfer of the *res* in this case 'reasonably prevented [them] from applying for a stay.'" Pet. App. F1 (quoting *United States* v. *$29,959 U.S. Currency*, 931 F.2d 549, 552 (9th Cir. 1991)).

ARGUMENT

Petitioners contend (Pet. 9-35) that the court of appeals erred in dismissing their appeal from the district court's order forfeiting their funds to the government. As petitioners point out (Pet. 9-11), there is a conflict in the courts of appeals over whether, in an *in rem* forfeiture proceeding, the removal of the *res* from the geographic jurisdiction of the court deprives the court of jurisdiction.[1]

---

[1] In addition to the court of appeals in this case, the Seventh and Eleventh Circuits adhere to the view that the presence of the *res* is a prerequisite to *in rem* jurisdiction. See *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989); *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988). In a recent unpublished decision, the Sixth Circuit agreed with the Seventh, Ninth, and Eleventh Circuits. See *United States* v. *A 1985 Cadillac Fleetwood*, No. 91-3388 (6th Cir. Sept. 12, 1991), petition for cert. pending *sub nom. Price* v. *United States*, No. 91-1141 (filed Jan. 10, 1992). The Fifth Circuit also appears to adhere to that rule. See *United States* v. *$79,000 in U.S. Currency*, 801 F.2d 738, 739 (1986). On the other hand, four courts of appeals take the view that even after the departure of the *res* from the jurisdiction of the court, the court retains jurisdiction over the government and thus may order the government to return forfeited funds. See *United States* v. *$12,390*, 956 F.2d 801 (8th Cir. 1992); *United States* v. *One Lot of*

On February 24, 1992, this Court granted the petition for a writ of certiorari in *Republic National Bank* v. *United States*, 112 S. Ct. 1159. That case presents the question whether the removal of the *res* from the district in an *in rem* forfeiture proceeding deprives the court of appeals of jurisdiction. In *Republic National Bank*, the government filed an *in rem* action under 21 U.S.C. 881 seeking the forfeiture of a single-family residence. While the case was pending in the district court, the house was sold and the proceeds were deposited with the United States Marshal. Following a bench trial, the district court issued a final judgment of forfeiture. The claimant appealed, but failed to file a supersedeas bond or seek a stay of the district court's judgment. The United States Marshal then transferred the proceeds of the sale of the house into the Assets Forfeiture Fund of the United States Treasury. Because the *res* had left the court's jurisdiction, the court of appeals dismissed the appeal.

In this case, as in *Republic National Bank*, the court of appeals dismissed the claimants' appeal because the *res* had left the jurisdiction of the district court. We therefore suggest that the Court hold the petition for a writ of certiorari in this case pending its decision in *Republic National Bank*.[2]

$25,721.00 in Currency, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States* v. *Aiello*, 912 F.2d 4, 7 (2d Cir. 1990) (holding that the court had jurisdiction but ruling for the government on the merits), cert. denied, 111 S. Ct. 757 (1991); *United States* v. *$95,945.18, United States Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990). See also *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991) (declining to apply the rule that the departure of the *res* from the jurisdiction of the court deprives the court of jurisdiction when the *res* is money).

[2] Petitioners contend (Pet. 22-24) that the court of appeals erred in dismissing their appeal because the United States removed the *res* from the jurisdiction of the district court before the expiration of the automatic ten-day stay of execution provided by

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Republic National Bank* v. *United States*, cert. granted, 112 S. Ct. 1159 (1992), and then disposed of in light of the decision in that case.

Respectfully submitted.

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JULY 1992

Federal Rule of Civil Procedure 62(a). Although petitioners are correct that the Marshal removed the *res* from the district within ten days of entry of the judgment, petitioners took no action to stay the execution of the judgment within ten days. Consequently, they were not prejudiced by the Marshal's action. See *United States* v. *$29,959 U.S. Currency*, 931 F.2d 549, 552 (9th Cir. 1991).